IN THE

Supreme Court of the United States

..... Term, 1978

No. 78-234

CYRIL J. NIEDERBERGER,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Your petitioner, Cyril J. Niederberger, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit in the above captioned cases.

OPINIONS BELOW

No opinion was rendered by the district court. The court of appeals' opinion and order dated May 5, 1978, affirming the district court's judgment of conviction, is not yet reported but is set forth herein at "Appendix A". The court of appeals' order, dated July 12, 1978, denying the petition for rehearing, is not yet reported but is set forth herein at "Appendix B".

JURISDICTION

On May 5, 1978, the court of appeals issued its opinion and order affirming the district court's judgment of conviction. The court of appeals issued an order denying the petition for rehearing on July 12, 1978, and the within petition for a writ of certiorari is being filed within thirty days of said order. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED

I. Whether 18 U.S.C.§201(g) and 26 U.S.C.§7214 (a)(2) require as a necessary element a *quid pro quo,* i.e., must a government employee receive something of value for or because of some specific official act?

II. Whether a district court has the power to grant use immunity to a defense witness and/or order the government to provide such immunity?

III. Whether grand jury attendance records can be examined to determine if the grand jury which returned the third indictment was the same grand jury which heard the evidence and returned the earlier indictments?

IV. Whether a request for a special evidentiary hearing on the issue of selective prosecution should be granted when there is a first time prosecution for accepting goodwill entertainment under 18 U.S.C.§201(g) and 26 U.S.C.§7214(a)(2)?

V. Whether a bill of particulars is required when an indictment is duplicitous?

VI. In a prosecution under 18 U.S.C.§201(g) and 26 U.S.C.§7214(a)(2), whether the trial judge must charge the jury that the gratuities must be received within the jurisdiction?

VII. Whether a severance of counts of the indictment should have been granted when clear prejudice appears during the course of trial?

VIII. Whether testimony concerning a defendant's admissions should be stricken when the witness, an Internal Revenue agent, testified that he destroyed the original rough notes of his interview with defendant?

STATUTES INVOLVED

TITLE 18 UNITED STATES CODE, SECTION 201(G):

(g) Whoever, being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him . . .

Shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

TITLE 26 UNITED STATES CODE, SECTION 7214(A)(2):

(a) Unlawful acts of revenue officers or agents.—Any officer or employee of the United States acting in connection with any revenue law of the United States . . .

(2) who knowingly demands other or greater sums than are authorized by law, or receives any fee, compensation, or reward, except as by law prescribed, for the performance of any duty . . .

shall be dismissed from office or discharged from employment and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both . . .

STATEMENT OF THE CASE

History

On July 16, 1976, your petitioner, Cyril J. Niederberger, was indicted at criminal number 76-143 in the United States District Court for the Western District of Pennsylvania. This indictment was superseded by a second indictment on September 15, 1976, which in turn was superseded by a third and final indictment on January 10, 1977. This indictment named only Niederberger and charged him in five (5) counts with violating Title 18 United States Code, Section 201(g), and in five (5) counts with violating Title 26 United States Code, Section 7214(a)(2). Counts one (1), three (3), five (5), seven (7) and nine (9) allege that at Pittsburgh, in the Western District of Pennsylvania, Niederberger, a supervising Internal Revenue agent who was the case manager for the Internal Revenue Service (hereinafter sometimes referred to as "IRS") audit of Gulf Oil Corporation's (hereinafter referred to as "Gulf") income tax returns, did unlawfully and knowingly accept, receive and agree to receive a thing of value for himself from Gulf, otherwise than as provided by law for the proper discharge of his official duties, for and because of official acts performed and to be performed by him, namely the audit of certain annual Gulf income tax returns. It is further alleged that the things of value were vacations at Pompano Beach, Florida (count 1), Miami Beach, Florida (count 3), Absecon, New Jersey (count 5), Pebble Beach, California (count 7) and Las Vegas, Nevada (count 9), which included, among other things, airfare tickets, lodging, meals, drinks and golf outing fees, all in violation of 18 U.S.C. §201(g).

Counts two (2), four (4), six (6), eight (8) and ten (10) allege that at Pittsburgh in the Western District of Pennsylvania, Niederberger who was a federal officer and employee, namely a supervisory Internal Revenue agent and case manager for the audit of certain Gulf income tax returns, did unlawfully and knowingly receive a fee, compensation and reward which was not prescribed by law for the performance of his duties as an IRS agent. It is further alleged that such fee, compensation and rewards were the same vacations recited above, i.e., at Pompano Beach, Florida (count 2), Miami, Florida (count 4), Absecon, New Jersey (count 6), Pebble Beach, California (count 8) and Las Vegas, Nevada (count 10), which included, among other things, airfare tickets, lodging, meals, drinks and golf outing fees, all in violation of 26 U.S.C. §7214(a).

All pre-trial motions, whenever filed, were incorporated and applied to the superseding, third indictment. A jury trial on said indictment was convened before the Honorable Daniel J. Snyder, District Judge, on February 17, 1977. On February 25, 1977, the jury returned a verdict acquitting Niederberger as to counts 1, 2, 4, and 6, but convicting him as to counts 3, 5, 7, 8, 9 and 10.

On March 29, 1977, Niederberger was sentenced by the district court to imprisonment for a term of two years as to count 3 on the conditions that he be incarcerated for a period of six (6) months with the remainder of the imprisonment suspended and that he serve a five (5) year period of probation. He was also ordered to pay a $5,000.00 fine and the costs of prosecution. As to counts 5, 7, 8, 9 and 10, the imposition of sentence was suspended.

The judgment of sentence was affirmed by the United States Court of Appeals for the Third Circuit on May 5, 1978. A petition for rehearing was denied on July 12, 1978. The within Petition For Writ of Certiorari follows.

Facts

Ernest A. Vendrell, comptroller for Doral Hotel and Country Club in Miami, Florida, testified to a bill incurred by a C. Niederberger at Doral from January 19 to January 22, 1973, in the amount of $143.87. Said bill was transferred to that of one J. F. Fitzgerald, a companion on the trip, who paid it by American Express card and the money was then received from the American Express Company and not from Gulf Oil Corporation.

Wilma Conover, accounts receivable clerk for Seaview Country Club in Absecon, New Jersey, identified a Seaview reservation card in the names of Mr. and Mrs. Niederberger for August 31 to September 3, 1973. Their bill in the amount of $169.21 was transferred to Arthur V. Harris, a fellow vacationer. Mrs. Conover did not know who paid the bill.

Mrs. Gordon Nelson, an employee in the accounting office of Del Monte Lodge, Pebble Beach, California, identified a Del Monte record which indicated a reservation was made for a Mr. Niederberger on March 28, 1974, by one "Chris Shultz". Niederberger's bill (for April 2-5, 1974) in the amount of $247.56 was included with the bills of Fitzgerald and one Mr. Standefer, and paid for by Fitzgerald with an American Express card.

John Alderfer, controller at the Desert Inn and Country Club in Las Vegas, Nevada, testified that a Mr.

& Mrs. C. J. Niederberger were guests along with the Standefers, Fitzgeralds and Snokhaus' from June 17, 1974, to June 21, 1974. The Niederberger bill of $149.91 was transferred to Mr. Fitzgerald's account which was paid by an American Express card.

Alan E. Hobron, an IRS investigator, interviewed Cyril J. Niederberger, who as the "Large Case Manager" headed the IRS team auditing Gulf. He testified that on June 18, 1976, Niederberger told him that from 1967 or 1968 when he was assigned to the Gulf audit until 1975 when he retired from the IRS he accepted meals, drinks, golf outings, lodging, liquor, airfares and gifts. In regard to the Doral trip, he said it was a golf outing arranged and paid by Gulf with the plans for same being made in Pittsburgh. Also, the Seaview, Pebble Beach and Desert Inn trips were arranged and paid for by Gulf. Harris, Standefer and Fitzgerald were all identified as Gulf employees. Fitzgerald was said to be a friend of Niederberger for thirty years.

William C. Church, from the Personnel Office of the Pittsburgh District of the IRS, testified that Niederberger's annual salary in 1967 was $18,481.00, and after periodic increases his salary in 1975 was $31,552.00.

Harold S. Levin served as Assistant Chief of the IRS Audit Division in Pittsburgh from October 1, 1973, to September 30, 1975. He explained that a "Large Case Manager" supervises a group of IRS agents who primarily examine the tax returns of "large taxpayers" (corporations with $250 million or more in assets). Cyril J. Niederberger was assigned as Large Case Manager for the Gulf audit. He testified that on July 11, 1971, the Gulf audit for 1960 and 1961 was completed; on

January 18, 1973, the Gulf audit for 1965 and 1966 was closed; on May 10, 1973, the Gulf audit for 1967 and 1968 was completed; and on April 1, 1974, the Gulf audit for 1969 and 1970 was closed, which audit was approved by the IRS review staff on June 27, 1974. All of these audits were "agreed audits". Levin also testified that he never worked on a "large case" in the IRS and he had neither a role in regard to the Gulf audit nor any personal knowledge of the Gulf audits. All "agreed audits" were examined by the IRS review staff and none of these from Niederberger's "large case" team were ever rejected.

Leon Moore, Chief of the IRS Audit Division in Pittsburgh from March, 1973, to November, 1975, testified that in 1974 Niederberger was assigned the special task, in addition to his audit duties, of determining whether or not alleged political campaign contributions by Gulf had any impact on its tax liability. After Niederberger's memorandum concerning the issue, the 1969 and 1970 Gulf audits were closed. He also testified that Niederberger correctly determined that Gulf owed no additional taxes by reason of their political contributions; that Gulf had agreed not to take any tax advantage for this in the future; that Niederberger's memorandum and all the Gulf audits were reviewed by many levels of the IRS; that none of the Niederberger audits have been changed after review; and that there was nothing in the Niederberger memorandum to prevent the IRS Intelligence Division from continuing an investigation into possible criminal fraud on the part of Gulf.

James J. Cox, manager of Gulf's general accounting department, identified certain Gulf employees travel and expense reports from 1967 through 1974 which related to Niederberger. Martin E. Boyd, an IRS internal se-

curity inspector, examined these reports and summarized from them the expenses relating to Niederberger which totaled 341 instances of entertainment from 1967 through 1975 for a sum of $7,445.43. He also testified that he has no personal knowledge whether in fact Niederberger ever participated in this entertainment or received gratuities of some sort or anything of value from Gulf in connection with any of the instances listed in his summary.

Christine Rugh, whose maiden name was "Shultz", served as secretary to Mr. Standefer at Gulf from 1972 to 1975; in her job, she typed expense reports and made reservations for him. Sandra L. Feris, secretary to Standefer since August 1975, identified certain Fitzgerald expense reports and attachments thereto; she had no personal knowledge of the information contained on same.

N.B. Other testimony, where pertinent, will be detailed in the following text.

REASONS FOR GRANTING A WRIT OF CERTIORARI

Petitioner Niederberger presents two principal reasons for the granting of a Writ of Certiorari. First, he poses certain important questions of federal law which have not been, but should be, settled by this Court. Second, in view of the increasing concern about the level of trial counsel's competence, the instant case offers an example of how petitioner's counsel made every attempt but was prevented from rendering effective assistance to his client because of the trial court's rulings which individually and cumulatively resulted in the denial of a fair trial to petitioner.

I.

A. Petitioner Niederberger asks this Court to determine whether 18 U.S.C.§201(g)[1] and 26 U.S.C. §7214(a)(2)[2] require as a necessary element (to be plead and proven) a *quid pro quo,* i.e., must a government employee receive something of value for or because of some specific official act.

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1. 18 U.S.C. §201(g) reads as follows:

   "Whoever, being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself *for or because of any official act performed or to be performed by him.*" (Emphasis supplied.)

2. 26 U.S.C. §7214(a)(2) reads as follows:

   "Unlawful acts of revenue officers or agents . . . Any officer or employee of the United States

Prior to trial, petitioner Niederberger field a motion to dismiss the indictment in that the facts alleged do not constitute a criminal offense under 18 U.S.C. §201(g) or 26 U.S.C. §7214(a)(2). Neither the indictment nor the bill of particulars alleges the necessary element under both of these statutes of a specific *quid pro quo,* i.e., that Niederberger as a government employee received something of value "for or because of" some specific official act which he performed or was to perform in the future. Having omitted this necessary element, the indictment is plainly insufficient as a matter of law. Furthermore, the trial court's failure to charge on *quid pro quo* as a necessary element was erroneous.

Although there have been no reported federal prosecutions similar to this case, the issue presented here has been discussed on a few occasions by the courts, generally with respect to the adequacy of jury instructions bearing on tendered defenses. These cases hold that mere goodwill entertaining of government employees does not constitute an illegal gratuity or, to state it differently, that entertaining of a government employee unrelated to any "specifically identified official act" of that employee does not constitute an illegal gratuity. *United States v. Brewster,* 506 F.2d 62, 81-82 (D.C. Cir. 1974); *United States v. Arthur,* 544 F.2d 730 (4th Cir. 1976).

In *Brewster* the court stated that a gratuity given an official "out of the general support based on his past

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acting in connection with any revenue law of the United States . . .

(2) who knowingly demands other or greater sums than are authorized by law, or receives any fee, compensation, or reward, except as by law prescribed, *for the performance of any duty;*" (Emphasis supplied)

record or out of insubstantial hopes for the future" would not violate 18 U.S.C. §201(g). 506 F.2d at 77-78. The court went on to point out:

> "*There must be more specific knowledge of a definite official act* for which the contributor intends to compensate before an official's action crosses the line between guilt and innocence." 506 F.2d at 81. (Emphasis supplied.)

The court in *Brewster* emphasized that a payment to a government official becomes an illegal gratuity only when made because of a "specifically identified act" and that any payment must be received by the official with knowledge that he is being paid for *that act.*

This Court in *United States v. Brewster,* 408 U.S. 501, 527 (1972), in an opinion by Mr. Chief Justice Burger, reversed the district court's dismissal of the indictment on unrelated grounds but in remanding the case for trial, set forth the critical elements of an offense under §201(g) as follows:

> "To sustain a conviction [under 201(g)] it is necessary to show the appellee solicited, received, or agreed to receive, money *with knowledge that the donor was paying him compensation for an official act.*" (Emphasis supplied.)

Recently in *Arthur,* the Fourth Circuit held that entertainment of, or payments to, government employees do not constitute bribery when made in order to obtain only their general goodwill. There the court, citing *Brewster* with approval, wrote:

> "(criminal intent) is not supplied merely by the fact that the gift was motivated by some generalized hope or expectation of ultimate benefit on the part

> of the donor . . . 'bribery' imports the notion of some more or less specific *quid pro quo* for which the gift or contribution is offered or accepted." 544 F.2d at 734.

The Court in *Arthur* concluded that goodwill entertaining of government officials does not constitute bribery because the favor intended in such entertaining is not intended as a definite *quid pro quo* for a specific act by the government official but rather is only intended to generally influence the official's actions. In reaching this conclusion the court reasoned as follows:

> "It does not follow, however, that the traditional business practice of promoting a favorable business climate by entertaining and doing favors for potential customers becomes bribery merely because the potential customer is the government. Such expenditures, although inspired by the hope of greater government business, are not intended as a *quid pro quo* for that business: they are in no way conditioned upon the performance of an official act or pattern of acts or upon the recipient's express or implied agreement to act favorably to the donor when necessary." 544 F.2d at 734.
>
> "The crucial distinction between 'goodwill' expenditures and bribery is, then, the existence or nonexistence of criminal intent that the benefit be received by the official as a *quid pro quo* for some official act, pattern of acts, or agreement to act favorably to the donor when necessary." 544 F.2d at 735.

In the instant case the government does not allege that Niederberger was entertained for any specific official act. In fact, the government alleges only that he was entertained because of his *position* as IRS case manager

of the audit of Gulf Oil Corporation's income tax returns over a twelve year period. Such an indictment is insufficient in view of the absence of the necessary elements of an illegal gratuity, i.e., the acceptance of entertainment as a *quid pro quo* for a specific official act.

The legislative history of the comprehensive bribery and illegal gratuity sections of Title 18 offers further convincing and independent support that general goodwill entertaining of government employees does not constitute an illegal gratuity and that, therefore, the indictment should have been dismissed.

While the bribery and illegal gratuity statutes were under consideration by the Congress, amendments were offered in both the House and Senate which were designed to prohibit certain types of gifts to public officials. The amendments would have made it illegal for public officials to accept a gift, gratuity or favor from any person if, generally, such Government employee "has reason to believe the donor would not give the gift, gratuity or favor but for such employee's office or position within the Government." *Hearings on H.R. 302, H.R. 3050, H.R. 3411, H.R. 3412 and H.R. 7139 Before the Antitrust Subcomm. of the House Comm. on the Judiciary,* 87th Cong., 1st Sess., p.9 (1961). The amendments were designed to prohibit influence peddling and the purchasing of the goodwill of any federal employee by one who regularly does business with the employee or his agency. *Hearings on H.R. 8140 Before the Senate Comm. on the Judiciary,* 87th Cong., 2d Sess., p. 10 (1962).

In the Senate the amendment was proposed in the Judiciary Committee by Senator Keating who described his amendment in the following language:

"My last amendment is directed to an area in our conflict-of-interest laws where there now exists almost a complete void—that is, gifts to federal employees. News out of Texas and Washington in the last few weeks might lead one to think that Billie Sol Estes was the Santa Claus of Texas. *Under existing law the acceptance of a gift by a federal employee may not be illegal even though the employee's agency or department does regular business with the donor.* This is in my opinion is absurd and should be changed.

"*Under the amendment I suggest gifts to federal employees would be banned if the employee has reason to believe the donor would not give the gift but for the employee's position.* In addition, the bill would bar gifts to federal employees from donors having business relations with the employee's agency or where the donor conducts operations regulated by the employee's agency. Such obvious attempts at influence peddling or the purchasing of goodwill should be strictly prohibited." *Hearings on H.R. 8140 Before the Senate Comm. on Judiciary,* 87th Cong., 2d Sess., 9-10 (1962).' (Emphasis supplied.)

Deputy Attorney General Nicholas deB Katzenbach submitted the following comments on the proposed gift amendment, which reflected the views of the administration on this amendment:

"*Senator Keating's proposal* relating to gifts *would prohibit a Government employee,* whether regular or intermittent, *from receiving "any thing on economic value" as a gift from any person if he has*

reason to believe the donor would not give the gift but for the employee's official position. Subsection (a). A regular Government employee would be barred from receiving any thing of economic value as a gift from any person if the employee has reason to believe such person does business with the employee's agency, is regulated by it, or may be substantially affected by the employee's performance of duty.

"Although federal law contains some statutory prohibitions relating to gifts, they are miscellaneous provisions operating in limited areas, e.g., 5 U.S.C. 113 (prohibition of presents to superiors) and 5 U.S.C. 174d (termination of contracts because of gifts by Department of Defense contractors to Government employees). *General prohibitions restricting the receipt of gifts from private sources at the present time are principally a matter of individual agency regulation . . .*

"*In view of the steps taken by the administration to guard against the acceptance of improper gifts by Government employees, the proposed gifts section does not appear to be necessary.* However, the administration would not object to its inclusion in the bill." *Senate Hearings, supra* at 25. (Emphasis supplied.)

In view of the position of the Department of Justice that this amendment did "not appear to be necessary" it is not surprising that it was defeated. The language of this amendment was not included in the bill passed by the House, H.R. 8140, passed August 7, 1961, and on the Senate side the proposal was not included in the bill

reported out of the Senate Judiciary Committee.[3] S. Rep. No. 2213, 87th Cong. 2d Sess. (1962). The opposition of Congress to this amendment originated in a 1958 staff report of the House Anti-Trust Subcommittee. The report concluded that the subject of gifts and social entertainment should be handled in a code of ethics for government employees, rather than in a criminal statute. The code of ethics, the staff recommended, should make it improper for a government employee to accept gifts or "to become unduly involved, through frequent or expensive social engagements" with persons doing business with the government. Staff Report, Parts III-V, p. 68 (85th Cong., 1958). The proposed sanctions included barring violators from agency practice for a time, but did not propose criminal prohibition or sanctions.

Viewing such gratuities as being more appropriately the subject matter of ethical regulations and guidelines, Congress rejected this amendment, making it clear that it was drawing a sharp distinction between gratuities given public officials because, on the one hand, the donor is doing business with the official and the official is in a *position* to affect the donor's interest generally, and on the other hand, gratuities given public officials "for or because of" specific official acts.

The purpose of the rejected amendment was to expand the law prohibiting illegal gratuities to include not

3. Senator Keating had intended to offer his amendment again on the Senate Floor but when the bill was called up for debate near the close of the session Senator Keating declined to offer the amendment for fear it might jeopardize final passage of the entire bill. Cong. Record, 87th Cong. 2d Sess., Oct. 3, 1962, p. 21987.

just the gratuity given for a specific act, but also the gratuity given for more general purposes, such as, obtaining the goodwill of the recipient. In rejecting this amendment, Congress indicated plainly that it wished to limit the illegal gratuity prohibition to those situations where the gratuity was given for a definite and specific official act, making the offense an approximation of common law bribery.

To convict a government official by proving that he knowingly received a reward for an identifiable act is sustainable under the "for or because of" language; however, to apply §201(g) to other payments, such as gifts or entertainment which might tend to establish goodwill, but which were not intended as a reward for an *identifiable act,* would be manifestly inappropriate. Congress explicitly rejected the proposed legislation which would have precluded Government employees from accepting gifts and entertainment, if such employee had reason to believe the gift would not have been given but for the employee's *position.* If the provisions of §201(g) were interpreted more broadly than the courts have sanctioned, any conviction would not only be contrary to the judicial holdings discussed above, but such conviction would be based on conduct which Congress deliberately and expressly determined not to subject to criminal sanction.

B. Petitioner Niederberger asks this Court to determine whether a district court has the power to grant use immunity to a defense witness and/or order the government to provide such immunity.

Prior to trial, petitioner Niederberger asked the trial court to order the government to grant immunity to two defense witnesses, Fred Standefer and J. W. Fitzgerald; after argument thereon, the motion was denied. During trial, the government produced evidence which indicated that these two men had escorted Niederberger on the trips which formed the basis of the indictment and paid his expenses for said trips. Clearly, Standefer and Fitzgerald had knowledge of facts essential to a fair and proper finding by the jury, and their testimony was necessary to assure Niederberger a fair trial. Both men were expected to assert their Fifth Amendment privilege against self-incrimination if called on to testify. Under these circumstances, Niederberger contends that the refusal to grant immunity to the witnesses as requested resulted in a denial of his constitutional rights to due process under the Fifth Amendment and compulsory process under the Sixth Amendment.

The power of a court to provide remedies for violations of due process has been recognized as extending to the ability to order grants of immunity for defense witnesses. *United States v. Morrison,* 535 F.2d 223 (3rd Cir. 1976); *United States v. Shaeffer,* 528 F.2d 920 (4th Cir. 1975); *United States v. Leonard,* 494 F.2d 955, 985 n. 79 (D.C. Cir. 1974) (concurring and dissenting opinion of Bazelon, D.J.); *Earl v. United States,* 361 F.2d 531, 534 n. 1 (D.C. Cir. 1966); *State v. Broady,* 321 N.E. 2d 890 (Ohio, 1974). Also, the distinct advantage accorded the prosecution by its unilateral power to compel testimony has attracted the attention and concern of several courts. *United States v. Ramsey,* 503 F.2d 524, 532 (7th Cir. 1974); *Earl v. United States,* 364 F.2d 666 (D.C. Cir. 1966), Statement of Judge Leventhal; *United States v. Jones,* 476 F.2d 885, 888 (D.C. Cir. 1973) (Bazelon, C.J., dissenting); *United States v. Gaither,* 539 F.2d 752 (D.C. Cir. 1976), Statement of Chief Judge Bazelon.

Generally, the defendant's interest in seeking to immunize a witness has been overshadowed by the responsibility of prosecutorial discretion. *United States v. Alessio,* 528 F.2d 1079 (9th Cir. 1976). But in the instant case, there is no conflict. Niederberger seeks the limited use immunity for his witnesses provided for in 18 U.S.C. §6002 and upheld by this Court in *Kastigar v. United States,* 406 U.S. 441 92 S.Ct. 1653, 32 L.Ed. 2d 212 (1972). Quoting *Murphy v. Waterfront Commission,* 378 U.S. 52, 84 S.Ct. 1594, 12 L.Ed. 2d 678 (1964), the *Kastigar* Court held that "immunity from use and derivative use 'leaves the witness and the Federal Government in substantially the same position as if the witness had claimed his privilege'," on the absence of a grant of immunity. 92 S.Ct. at 1664, 406 U.S. at 458. *Kastigar* interprets the Fifth Amendment as "a privilege against a subsequent prosecution of the witness based on his own words"[4]. The government controls the method in which this privilege is exercised by allowing a witness to remain silent or granting his immunity and compelling him to answer. It is incumbent on a government which adheres to the principle of "equal justice under law" that this power be exercised fairly, that it be used to bring out the truth and not merely to insure convictions.

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4. Westen, "The Compulsory Process Clause", 73 Michigan L. Rev. 71, 167 (1974).

The witnesses Niederberger seeks to immunize, more than any of the witnesses the government called, could reveal the truth. Since they were involved in the activities for which he was indicted, they, better than any hotel clerk or IRS agent, would be able to testify to the actions of Niederberger.

The limited scope of this immunity, as held in *Kastigar,* does not impair the prosecutor's function to determine whom to prosecute and not prosecute. The Assistant United States Attorney in the instant case admitted that the grand jury was close to returning an indictment against Fitzgerald and Standefer.[5] A grant of immunity would not have prevented or forestalled the indictment. Apparently, the government considers its case strong enough, so none of the testimony which Fitzgerald and Standefer would have presented on behalf of Niederberger or any evidence derived therefrom would be needed for prosecuting them. It is clear that the rights and interests of both prosecutor and witness would have been adequately protected by a grant of immunity in accordance with 18 U.S.C. §6002.

The right to offer testimony of witnesses, and to compel their attendance is a fundamental element of due process of law. *Washington v. Texas,* 388 U.S. 14, 87 S.Ct. 1920 (1967). The court's refusal to grant Fitzgerald and Standefer immunity, particularly in light of the fact that the government's interests were not harmed, deprived Niederberger of the testimony to which he was constitutionally entitled. The government's ability to present inculpatory testimony by immunizing

5. Indictments were returned against Fitzgerald and Standefer on June 14, 1977, in the United States District Court for the Western District of Pennsylvania.

witnesses, while denying immunity to witnesses with exculpatory evidence, unfairly restricts the accused's ability to present a defense and seriously impairs the jury's ability to return a just verdict. The court's denial, in effect, constitutes suppression of the potentially exculpatory testimony of Fitzgerald and Standefer, in violation of this Court's ruling in *Brady v. Maryland,* 373 U.S. 83, 10 L.Ed. 2d 215, 83 S.Ct. 1194 (1963).

II.

The following text will detail counsel's attempts to render effective assistance and the law in support thereof.

A. Counsel should have been able to examine grand jury attendance records to determine if the grand jury which returned the third indictment was the same grand jury which heard the evidence and returned the earlier indictments.

Prior to trial, petitioner Niederberger asked the trial court to examine pertinent grand jury records. Three indictments had been returned, and his counsel explained that such an examination was necessary to determine both which grand jury was convened on the dates of each return and which members of those grand juries were present on the dates of each return. At the hearing on said petition, counsel asserted a right to know whether those grand jurors who voted to return the third indictment (which was eventually tried) were the same grand jurors who heard the evidence relating to the first indictment. The underlying reason was to ascertain if the third indictment was returned by a grand jury which heard all the evidence of the alleged crime or merely part of it. Counsel for the government

was not sure whether the same grand jury returned all three indictments. Niederberger simply expressed a desire to examine the grand jury attendance records, but the trial court nevertheless denied the petition.

At trial, following the close of the government's case, Niederberger requested any exculpatory evidence, specifically the transcript from the grand jury which returned the third indictment. It was noted that the third indictment was signed by a foreman different from the individual who signed the first and second indictment. Also, it was pointed out (as learned via cross-examination) that no witness who testified at trial had appeared before a federal grand jury concerning this case. Thereupon, counsel for Niederberger requested the trial court to exercise its supervisory power and determine *in camera* whether or not the final indicting grand jury heard any sworn testimony which could substantiate the return of an indictment. After the prosecutor indicated there were no transcripts of testimony, the request was denied. Because of the lack of transcripts, Niederberger claimed a denial of due process and moved to dismiss the indictment; said motion was also denied.

Niederberger then requested a voir dire examination of those individuals who would be privy to whether or not any evidence was presented to the indicting grand jury. After the prosecutor responded that the indictment was presented through IRS agent Charles Nagy, the request was denied. Finally, Niederberger moved to interrogate Nagy under oath to determine whether he testified before the indicting grand jury concerning all ten counts, which motion was denied.

Immediately prior to the sentencing in this matter, counsel for Niederberger stated that it appeared as if

Nagy went before a grand jury which was recording testimony in other matters but did not do so in regard to his testimony concerning the instant case. The prosecutor affirmed this by declaring:

> "Mr. McKay: Your Honor, it appears to me that the representation that Mr. Livingston desires that I make to the Court is that although the testimony of the agent who testified before the grand jury, the particular panel that returned this indictment, that his testimony was not recorded. That in other cases, all be it gambling or various and sundry other cases, before that particular panel, that testimony of other witnesses as regards those other cases was, in fact, recorded. I have made inquiry in that regard and I am satisfied that in those other unrelated cases, regarding this particular panel, that testimony of those witnesses was recorded."

Niederberger contends that to deny him his requested examination of the grand jury attendance records was erroneous. It was essential to discover whether the grand jury which returned the third indictment was the *same* grand jury which returned the earlier indictments after hearing evidence. *United States v. James,* 290 F.2d 866, 869 (5th Cir. 1961). It was also necessary to make certain that the government, having decided to dismiss not one but two indictments and return for a third, followed the rules and "not (to) attempt a loose, shortcut procedure fraught with deficiencies of constitutional dimension". *United States v. Gallo,* 394 F. Supp, 310, 316 (D. Conn. 1975). Such an examination would not have breached any grand jury secrecy rules, but would have allowed the accused, with no hardship on the court or government, an opportunity to determine

whether or not his constitutional rights to indictment by a grand jury (a defendant is entitled " . . . to have the grand jury make the charge on its own judgement", *Stirone v. United States,* 361 U.S. 212, 219, 80 S.Ct. 270, 274 (1960)), and to due process of law had been honored. This is an especially important request in view of the prima facie showing of irregularity here,[6] i.e., principally, the return of three indictments, the indictments being signed by different foremen, no trial witness having appeared in the grand jury and the change as to who was in fact the government's only witness before the grand jury.[7]

Niederberger also argues that the failure to record the testimony of the single witness appearing before the grand jury was erroneous, and the motion to dismiss the indictment on this ground should have been granted. As the court held in *United States v. Crutchley,* 502 F.2d 1195, 1200 (3d Cir. 1974):

> "The practice of recording the grand jury testimony only of non-Government witnesses is undesirable, since it denies defendants the same opportunity available to the Government of impeaching the trial testimony of those witnesses unfavorable to their case. *If* the testimony of any grand jury witness

6. That a court will "look behind" an indictment when there appears some irregularity, or the possibility thereof, is not novel. Eg. see: *United States v. Ramirez,* 482 F.2d 807, 812 (2d Cir. 1973); *United States v. Estepa,* 471 F.2d 1132 (2d Cir. 1972); *Truchinski v. United States,* 393 F.2d 627, 634 (8th Cir. 1968).

7. Since the last court proceedings, the prosecutor, Mr. McKay, has informed counsel for Niederberger that the IRS agent who testified before the grand jury was not Mr. Nagy but one Glen Hartzell.

> or witnesses is to be recorded, either by a court reporter or a recording device, all such testimony should be recorded so that the defense and the Government will both have available all portions of the grand jury testimony, provided that the court approves the method, form and condition of disclosure. This practice would prevent the recording of only those portions of grand jury testimony helpful to the Government."

In the case at bar, the prosecutor admitted that the testimony of the only witness appearing before the grand jury was not recorded despite the fact that all the other testimony heard by that same grand jury concerning other cases was recorded. In addition, the witness was a government agent. Such selectivity of grand jury recording is unfair, without justification, arbitrary and discriminatory. Under all of the circumstances, it is submitted that the mandate and reasoning of *Crutchley* apply here.

B. Petitioner's request for a special evidentiary hearing on the issue of selective prosecution was denied.

Prior to trial, Niederberger filed a motion to dismiss the indictment because of selective prosecution. Therein, it was alleged that countless others in a similar position have not been prosecuted for like conduct. It was further alleged that under all the surrounding circumstances his prosecution was fundamentally unfair. At the hearing on said motion, counsel for Niederberger detailed many well publicized instances of business and industry entertainment of government officials, and argued that the within case is the first since the birth of the applicable statutes (nearly 100 years) where there is a prosecution for entertainment, not for pay-

ment of monies but for goodwill entertainment alone. It was also argued that the government is collaterally estopped from prosecuting here in view of the continued, long standing disregard for enforcement of these statutes. Niederberger requested a special evidentiary hearing on the issue.

Subsequent to the hearing, the trial court denied the motion for the stated reason

> " . . . that the defendant has not alleged that the decision to prosecute his case was made in bad faith for some invidious or evil purpose or that the selection of this case for prosecution was deliberately based upon an unjustifiable standard such as race, religion or a desire to prevent the exercise of constitutional rights . . . "

The request for a special evidentiary hearing was also denied. A motion for reconsideration was filed wherein Niederberger asserted that he did allege, and support with exhibits, that the discriminatory selection of him for prosecution was made arbitrarily and such selection itself presents an "unjustifiable standard". Said motion for reconsideration was denied.

In reference to the trial court's ruling, Niederberger contends that his prosecution is "invidious" or unfairly discriminatory. The statutes cited here, 18 U.S.C. §201(g) and 26 U.S.C. §7214 (a) (2) have never been invoked until now to prosecute social and general goodwill entertaining in the context of the business-government relationship. Yet here, Niederberger stands accused because of a social practice without allegation that a specific official act was promised or sought through such practice.

The evidence of numerous cases of similar behavior known to the prosecutors establishes beyond question a pattern of discrimination in the enforcement of the law. Singling out a circumstance involving a former lower echelon regional official while deliberately ignoring more highly visible offenders who have admitted like conduct amounts to an "unjust and illegal discrimination between persons in similar circumstances". *Yick Wo v. Hopkins,* 118 U.S. 356, 374 (1886). See also: *Oyler v. Boles,* 368 U.S. 448, 456 (1962).

The lower court's ruling construes too narrowly the boundaries of discriminatory prosecution. It limits the defense to cases of (1) bad faith and invidious or evil purpose, and (2) selection based upon unjustifiable standards such as race, religion, or impairment of constitutional rights.

The case law will not sustain such a narrow reading. In *United States v. Robinson,* 311 F. Supp. 1063 (W.D. Mo. 1969), wherein the court sustained a claim of discriminatory prosecution and dismissed the indictment, there was neither prosecutional bad faith and invidious or evil purpose, on the one hand, nor selection based upon a constitutional classification, such as race, religion, or exercise of First Amendment rights, on the other.

In *Robinson, supra,* the government prosecuted a private detective for illegal wiretapping under a criminal statute which did not exclude government officials and in circumstances where the government had consciously never prosecuted government officials for the same offense, although it had numerous occasions to do so. The lesson of *Robinson* is that the category of persons discriminated against can be very broad (e.g., all

private persons) and that the discrimination can operate through favoritism toward a category of persons not prosecuted *(e.g.,* failure to prosecute government officials) rather than through an conscious bias against the defendant as an individual identified with a particular cause or a particular class of citizens.

Here, as in *Robinson,* the discrimination is more subtle than the typical case of prosecutional bias attached to defendant's race, religion, or political views because the discrimination operates through favoritism shown to a category of persons against whom the criminal law is consciously not enforced. In order to perceive this discrimination, this court must look at the category of persons against whom the "gratuity" statutes are not being enforced—highly place officials in the heart of the political arena, Washington, D.C., whose prosecution would touch upon the politically sensitive preserves of important government agencies. Those agencies are permitted to shelter their officials from criminal prosecution through the lesser sanctions of administrative procedures.

Conscious nonenforcement of the criminal law based upon considerations of political expedience discriminates against this defendant who, as a lower echelon official of a regional governmental office far removed from the political arena, enjoys no similar protection, as surely as if the defendant were being impaired in the exercise of his religion or in the freedom to express his political views.

Finally, Niederberger maintains that he has established a *prima facie* case of selective prosecution such that the burden of proof shifts to the government to prove that there has been no unjust discrimination. In

United States v. Falk, 479 F.2d 616, 623 (7th Cir. 1973), the Seventh Circuit, after finding that the defendant's allegations had made out a *prima facie* case of improper discrimination, remanded the case for a hearing at which Falk could question the prosecution and present additional evidence and at which the government would bear the burden of proving the propriety of the prosecutor's exercise of discretion. Similarly, in *United States v. Crowthers,* 456 F.2d 1074, 1078 (4th Cir. 1972), the Fourth Circuit, in reversing defendant's conviction, stated that "where it appears that the government is in ready possession of the facts, and the defendants are not, it is not unreasonable to reverse the burden of proof and require the government to come forward with evidence . . . " And in *United States v. Steele,* 461 F.2d 1148, 1152 (9th Cir. 1972), the Ninth Circuit, in reversing outright a conviction based on "purposeful discrimination", commented that "since [defendant] had presented evidence which created a strong inference of discriminatory prosecution, the government was required to explain it away, if possible, by showing the selection process actually rested upon some valid ground."

Under the circumstances of this case, where Niederberger's proffered evidence far exceeds that which is necessary to establish a *prima facie* case of discrimination, the burden of proof should have been shifted to the government to establish that it has not engaged in discriminatory prosecution in violation of the Fifth Amendment.

C. Even though faced with a duplicitous indictment, Niederberger's request for a bill of particulars on certain charges was denied.

Rule 8(a) of the Federal Rules of Criminal Procedure states, in pertinent part, as follows:

> "(a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information *in a separate count for each offense* . . . " (Emphasis supplied)

Petitioner Niederberger claimed below that this Rule is contravened by the instant indictment because each count therein alleges more than one offense and is thus duplicitous. In the odd-numbered counts, the indictment alleges that Niederberger did "accept, receive and agree to receive a thing of value" from Gulf; each count thereby alleges three different criminal acts: accepting, receiving *and* agreeing to receive. Besides violating Rule 8(a), this caused severe prejudice to Niederberger. It is clear from the record that the first two acts, acceptance or receipt of things of value by Niederberger, occurred outside the jurisdiction of the United States District Court for the Western District of Pennsylvania. Therefore, he was tried in five counts on two acts each over which the court had no jurisdiction, yet he was presumably convicted for the third act (in each of the five counts) which the government asserted did occur within the court's jurisdiction.

In the even-numbered counts, the indictment alleges that Niederberger received a "fee, compensation and reward" from Gulf. It is submitted that more than one offense is charged by such language. The meanings of these terms are distinct and depending on which term

is utilized the connotations are likewise distinct as they are applied to the facts herein. Receiving compensation implies something different from receiving a reward, and in the context of this case, the exact implication of, and relationship between, the receipt of a vacation and the performance of IRS duties by Niederberger is significant. Moreover, the statute's language supports the position that more than one offense is charged. 26 U.S.C. §7214(a)(2) specifically proscribes the receipt of "any fee, compensation *or* reward". While the statute speaks in the disjunctive, the indictment speaks in the conjunctive and thus charges more than one offense.

Prejudice to Niederberger as a result of the duplicitous indictment is further evident when the following question is examined: upon which act or acts did the jury base its verdict? The verdict could have been based on one or two acts not occurring within the court's jurisdiction in counts 3, 5, 7 and 9. In counts 8 and 10, the jury may have relied, for instance, on the allegation that Niederberger received "compensation" even though neither the government's theory nor the evidence could support such reliance.

Even though faced with a duplicitous indictment, Niederberger's request for a bill of particulars on certain charges was denied. Because each count alleged three different criminal acts, Niederberger proposed certain questions in a bill of particulars. The three proposed questions which the lower court, by order of December 1, 1976, said did not have to be answered by the government were as follows:

> "1b) Did Cyril J. Niederberger receive a thing of value for himself from Gulf Oil Corporation? If so, what was it he accepted, where was it accepted and from whom was it accepted?"

"1c) Did Cyril J. Niederberger 'agree to receive' a thing of value for himself from Gulf Oil Corporation? If so, what was it (he) accepted, where was it accepted, and from whom was it accepted?"

"1d) As to each count of the indictment, what specifically was paid to Cyril J. Niederberger and by whom, in the Western District of Pennsylvania?"

Without answers to these questions, Niederberger could not prepare a defense, nor was the government limited to proof of a single specific act in a certain place at a certain time. Instead, as the indictment reflects, three different acts involving numerous possible situations were presented in each count.

Facing a duplicitous indictment and absent a bill of particulars, an accused is confronted with an insurmountable burden. He plainly cannot prepare and present a defense. Nor can he avoid a jury decision which could be based on a finding that some of the acts charged in a count were proven while other acts charged in the same count were not proven. Such a situation existed in the case *sub judice,* and consequently Niederberger's right to due process of law was denied him.

D. The trial court failed to instruct the jury that in order for the alleged crime to be proven the gratuities to Niederberger had to be received in the Western District of Pennsylvania. Such an instruction is critical to establishing the jurisdictional element of the offense in the instant case.

Counts 3, 5, 7 and 9 allege that Niederberger, "at Pittsburgh, in the Western District of Pennsylvania," did "accept, receive and agree to receive things of value" in violation of 18 U.S.C. §201(g). Clearly, there is no evidence that he *accepted* or *received* things of value in Pittsburgh or anywhere else within the Western District of Pennsylvania; it is undisputed that if anything of value (a vacation) was accepted or received this occurred outside the lower court's jurisdiction in Miami, Florida, Absecon, New Jersey, Pebble Beach, California, or Las Vegas, Nevada. Furthermore, the record is devoid of any proof that he *agreed,* within the Western District of Pennsylvania to receive these vacations; in fact, there is no proof that he agreed at any place to receive them.

The same is true for counts 8 and 10 which allege that Niederberger, "at Pittsburgh in the Western District of Pennsylvania", did "receive a fee, compensation, and reward" in violation of 26 U.S.C. §7214(a)(2). It is plain that there is no evidence whatsoever that he *received* a fee, compensation or reward in Pittsburgh or anywhere else within the Western District of Pennsylvania; it is undisputed that if the vacations were received this occurred outside the lower court's jurisdiction in Pebble Beach, California or Las Vegas, Nevada.

The venue[8] provisions of the Sixth Amendment and Rule 18 of the Federal Rules of Criminal Procedure embody the principle that a defendant must be tried in the district where the alleged crime was committed. According to the Sixth Amendment, an accused is entitled to a trial by jury "of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law". Rule 18 provides that "the prosecution shall be had in a district in which the offense was committed". Unless venue is waived, a judgment of acquittal must be rendered if trial is held in a different district. *Post v. United States,* 161 U.S. 583 (1894); *Parr v. United States,* 363 U.S. 370 (1960). Therefore, it is Niederberger's belief that since there was no evidence of any acceptance, receipt or agreement in the Western District of Pennsylvania, the lower court should have entered a judgment of acquittal. See: *Krogmann v. United States,* 225 F.2d 220, 227 (6th Cir. 1955).

The record is also devoid of evidence that Gulf Oil Corporation either paid for any 'thing of value" for Niederberger or provided a fee, compensation or reward to him as charged in each count of the indictment and elucidated in the government response to the bill of particulars. The government testimony and exhibits only demonstrate that an individual, who happened to be employed by Gulf as well as being a long-time friend of Niederberger, paid his resort bill on each vacation

8. The issue of improper venue was also raised by defendant-appellant Niederberger in his pre-trial motion to dismiss the indictment, wherein it was alleged that the lower court was without jurisdiction because each and every count of the indictment charges certain violations of law which occurred outside the jurisdiction of the indicting grand jury.

excursion. The payments at Miami, Pebble Beach and Las Vegas were made by Fitzgerald who used his American Express card; the witness from Absecon did not know who paid the bill there. The only possible connection to Gulf in evidence are expense vouchers submitted to Gulf by Fitzgerald for reimbursement of expenses incurred on his vacations with Niederberger. However, there is no evidence that these vouchers were honored or reimbursement made by Gulf.

Finally, there is no evidence of a *quid pro quo;* in other words, the government failed to prove that Niederberger received the gratuity (vacation) in exchange for a specific official act.

E. A severance of counts of the indictment should have been granted when clear prejudice appears during the course of trial.

Rule 14 of the Federal Rules of Criminal Procedure permits a severance if it is needed to avoid prejudice prior to trial. Also, events at trial may alter a situation such that severance is necessary in order to preserve a defendant's right to fair trial. A district judge has the power to order a severance under Rule 14, and indeed has a "continuing duty at all stages of the trial to grant a severance if prejudice does appear." *Schaffer v. United States,* 362 U.S. 511, 516, 80 S.Ct. 945, 948 (1960). At the trial below, prejudice did result from the joinder of counts of the indictment.

Prior to trial, Niederberger petitioned for relief from prejudicial joinder of the counts under Rule 14. In the indictment, each set of two counts charges a violation of 18 U.S.C. §201(g) and 26 U.S.C. §7214(a)(2). The odd-numbered counts charge the former, and the

even-numbered counts charge the latter. Each set of two counts alleges conduct constituting separate violations. First, each set alleges a specific act or acts distinct in time and place from that alleged in the other sets: counts 1 and 2 refer to an event in Pompano Beach, Florida, in May, 1971; counts 3 and 4 concern an event in Miami, Florida, in January, 1973; counts 5 and 6 refer to conduct in Absecon, New Jersey, in August, 1973; counts 7 and 8 involve acts in Pebble Beach, California, in April, 1974; and counts 9 and 10 are concerned with events in Las Vegas, Nevada, in June, 1974. Second, each set of two counts alleges a separate and distinct "thing of value" or "fee, compensation or reward" from that alleged in the other two count sets. The indictment charges five different gratuities having been received with each set of two counts concerned with a different one of the five. Third, with the exception of counts 3, 4, 5 and 6, each set of two counts alleges separate and distinct "official duties" or "official acts performed or to be performed" by Niederberger: i.e., the specific audits of the Gulf income tax returns were different as they were related in the indictment to each instance of gratuity.

Overall, the indictment charges five separate transactions in five different places at five different times. As noted below, this is not unlike trying five bank robberies in one trial. The prejudice to Niederberger in such a situation is obvious. To believe that a jury could perform the almost impossible task of separately weighing and considering the evidence in such a trial is unrealistic. Moreover, it is simply not fair to subject an accused to this purely for the sake of administrative expediency.

During the trial below, the request for relief from prejudicial joinder was again made or referred to on

three occasions when the prejudice arising from the joinder of counts became more apparent. First, the prosecutor made remarks in his opening address concerning gratuities and other alleged illegal activity not set forth in the indictment or bill of particulars; a fair trial on each separate charge is thus made even more illusory. Second, through government witness Moore, there was testimony in regard to an on-going investigation of certain Gulf audits and a memorandum from Niederberger as to whether Gulf had incurred additional tax liability because of certain political contributions. Said testimony is irrelevant and prejudicial in its own right as well as in relation to any other allegations but those in counts 7 and 8. It was inflammatory and did not bear on any issues in the other counts of the indictment. Third, also concerning the "on-going investigation" testimony, the argument was made that it only injects the "trial" of Gulf Oil Corporation into the instant case, and has no probative value on eight counts in the ten-count indictment. Nevertheless, such prejudicial testimony cannot be separated by a jury and applied only to the appropriate counts at the time of deliberation.

F. The trial court refused to strike the testimony of a key prosecution witness who testified to certain admissions by Niederberger and whose rough notes of his interview were destroyed, thus depriving petitioner of an effective and meaningful cross-examination.

During the trial, Allan E. Hobron, an Internal Revenue Service investigator, testified about an interview he had with Niederberger. On cross-examination, it was learned that Hobron had made notes during the course of the interview, notes which subsequently formed the basis of his report. Niederberger moved for the production of these notes under the Jencks Act (18 U.S.C. 3500) and Rule 16 of the Federal Rules of Criminal Procedure. The court agreed that "if the notes are available, you are entitled to them". The prosecutor informed the court that the notes had been destroyed "per the IRS guidelines". Niederberger immediately moved that Hobron's testimony be stricken and a mistrial be declared in view of the Internal Revenue Service's improper conduct. The motion was denied on the grounds that the notes did not have to be preserved.

The notes made by government agents of Niederberger's statements are potentially discoverable under the Jencks Act; *United States v. Vella,* 562 F.2d 275 (3d Cir. 1977); *United States v. Johnson,* 521 F.2d 1318 (9th Cir. 1975); *United States v. Harrison,* 524 F.2d 421 (D.C. Cir. 1975); *United States v. Bell,* 457 F.2d 1231, 1235 (5th Cir. 1972); *United States v. Harris,* 543 F.2d 1247 (9th Cir. 1976); and Rule 16 of the Federal Rules of Criminal Procedure; *United States v. Fioravanti,* 412 F.2d 401, 411, n. 12 (3d Cir. 1969); *United States v. Lewis,* 511 F.2d 798 (D.C. Cir. 1975). See also *United States v. Pollock,* 417 F.Supp. 1332 (D. Mass. 1976); *United States v. Bryant,* 439 F.2d 642 (D.C. Cir. 1971). The lower court's refusal to strike Hobron's testimony for the non-production of these notes, it is submitted, was reversible error. See: *United States v. Johnson, supra; United States v. Carrasco,* 537 F.2d 372 (9th Cir. 1976).

Hobron's testimony is clearly the most damaging to Niederberger, and the absence of the notes from the interview made an effective cross-examination impossible. The destruction of this seminal evidence, the most accurate written record of this key interview, constitutes a dangerous usurpation of the judicial function. In *United States v. Johnson, supra.* at 1318, the court held that:

> "It is the function of the trial court to determine the issue of producibility, i.e., to decide whether the notes in question constitute a 'statement' within the meaning of the [Jencks] Act."

The trial court was robbed of its responsibility to rule on the government's obligation to make certain evidence available to the defendant. Also, the defense was seriously impaired in its efforts to refute the government's claims. This is particularly true in the instant case, for Hobron's testimony is the only direct evidence that Niederberger agreed to receive gratuities in the Western District of Pennsylvania. Clearly, such evidence deserves and requires the closest scrutiny. This is best provided by a rigorous cross-examination, based on all the evidence to which the defendant is legally entitled.

As the court held in *United States v. Johnson, supra.* at 1320,

Conclusion.

"The question of whether an otherwise producible statement is useful for impeachment must be left to the defendant. Certainly the answer should not rest with the very witness whose testimony the defendant seeks to impeach."

The destruction of the notes unfairly deprived Niederberger of his right to contest Hobron's testimony. The admission of this testimony, in the absence of the notes, was clearly prejudicial to him.

CONCLUSION

For the reasons discussed above, petitioner Niederberger requests a writ of certiorari issue to review the judgment of the United States of Appeals for the Third Circuit.

Respectfully submitted,

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Attorneys for Petitioner

APPENDIX A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-1575

UNITED STATES OF AMERICA

v.

CYRIL J. NIEDERBERGER,

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

D.C. Crim. No. 76-143

Argued January 4, 1978
Before ROSENN and HIGGINBOTHAM, *Circuit Judges*, and BARLOW, *District Judge**

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*George H. Barlow, United States District Judge for the District of New Jersey, sitting by designation.

Appendix A.

Opinion of the Court

(Filed May 5, 1978)

BARLOW, *District Judge*

Cyril J. Niederberger, an employee of the Internal Revenue Service (I.R.S.), appeals his conviction on six counts of a ten-count indictment. The indictment charged Niederberger with accepting illegal gratuities from Gulf Oil Corporation (Gulf) in the form of five golfing trips paid for by Gulf.[1] Each golf trip provided the predicate for two counts in the indictment, the odd-numbered counts alleging violations of 18 U.S.C. §201(g) (1970)[2] and the even-numbered counts alleging violations of 26 U.S.C. §7214(a) (2) (1970).[3]

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1. The jury found the defendant not guilty of Counts I and II, which concerned a trip of Pompano Beach, Florida. The defendant was also acquitted of Counts IV and VI. These counts involved trips taken by Niederberger to Absecon, New Jersey, and Pebble Beach, California.

On March 29, 1977, Niederberg was sentenced to six months in jail, to be followed by a five-year period of probation. In addition, he was fined $5,000.

2. 18 U.S.C. § 201(g) provides:

Whoever, being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him.

3. 26 U.S.C. § 7214(a) (2) provides:

Any officer or employee of the United States acting in connection with any revenue law of the United States—

. . . .

Appendix A.

Niederberger seeks reversal on a variety of grounds. The principal arguments, however, are addressed to the trial court's refusal, first, to grant Niederberger's motion for severance; second, to compel the Government to provide use immunity for certain potential defense witnesses; third, to dismiss the indictment on the basis of duplicity; fourth, to dismiss the indictment for its failure to allege facts which constitute a federal offense; and, fifth, to strike the testimony of a prosecution witness who, prior to trial, had destroyed the rough notes upon which he based his testimony. Additionally, Niederberger contends that the evidence presented by the prosecution was insufficient to support a judgment of conviction.

However, following our careful consideration of all the issues raised by the appellant, we must affirm the judgment of the trial court in all respects.

The facts, briefly summarized, are as follows: During the period between 1971 and 1974, Niederberger was employed by the I.R.S. in its Pittsburgh office as a large case manager. This position required Niederberger to supervise a group of revenue agents assigned to audit certain corporate income tax returns filed by Gulf. Among Niederberger's responsibilities were the development and final approval of the audit plan, which is a detailed outline of the specific procedures to be utilized during the course of a particular audit. During the development of an audit plan, Niederberger was empow-

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(2) who knowingly demands other or greater sums than are authorized by law, or receives any fee, compensation, or reward, except as by law prescribed, for the performance of any duty.

ered to make all final decisions regarding the scope and depth of the areas of corporate taxation which were to be reviewed in the audit.

Further, in his position as the large case manager for Gulf, Niederberger had occasion to supervise the audits of Gulf's tax returns for the years 1960 through 1970 inclusive. Following the completion of a particular year's audit, representatives of Gulf would confer with Niederberger's staff to discuss the tax adjustments which the revenue agents determined were required by the audit. In each instance Gulf agreed to pay the proposed additional assessment without resort to available administrative appellate procedures.

During the same period that Niederberger was serving as the case manager for the Gulf audits, he accepted from Gulf—and at Gulf's expense—several golfing junkets at various resorts. More precisely, in January of 1973, Niederberger spent four days at the Doral Country Club in Miami Beach, Florida, in the company of Mr. John F. Fitzgerald who, at that time, was the Manager of Federal Tax Compliance for Gulf. Niederberger's entire bill was transferred to Fitzgerald's account, which was subsequently charged to Fitzgerald's American Express card. This trip provided the basis for Counts III and IV of the indictment.

In August and September of 1973, Niederberger and his wife spent four days at the Seaview Country Club in Absecon, New Jersey, in the company of, among others, Mr. Fred W. Standefer, Gulf's Vice-President of Tax Administration. The Niederbergers' expenses at Seaview were billed to Mr. Arthur V. Harris, who listed his billing address as the Gulf Oil Building, Pittsburgh,

Pennsylvania. Counts V and VI of the indictment embody this trip.

In April of 1974, Niederberger spent four days at the Del Monte Lodge in Pebble Beach, California, in the company of both Fitzgerald and Standefer. Again, Fitzgerald charged Niederberger's bill to his American Express card. Counts VII and VIII of the indictment reflect this trip.

Two months later, in June of 1974, Niederberger and his wife were guests of Fitzgerald for five days at the Desert Inn and Country Club in Las Vegas, Nevada. This trip underlies Counts IX and X of the indictment.

SEVERANCE

Prior to trial and pursuant to Fed. R. Crim. P. 14,[4] Niederberger moved unsuccessfully to limit the trial below to those offenses charged in any two counts contained in the indictment which had, as their common denominator, the location of one of the five golfing vacations. He urges on this appeal that the joinder of all ten counts in the indictment substantially prejudiced his right to a fair trial in that the jury was presented with evidence relating to all five golfing trips and could not, therefore, properly separate and distinguish the evidence with respect to each individual count.

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4. Rule 14 provides in pertinent part:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

Initially, it is settled that a district court's disposition of a Rule 14 severance motion will not be disturbed in the absence of a clear showing of an abuse of discretion. *United States v. Somers,* 496 F.2d 723, 730 (3d Cir.) *cert. denied,* 419 U.S. 832 (1974). The burden placed upon the appellant here to demonstrate such abuse is a heavy one. *Id.; see United States v. Rosa,* 560 F.2d 149, 154 (3d Cir.) *cert. denied,*—S. Ct.—(1977) (severance of defendants).

Moreover, joinder of offenses in one indictment is expressly permitted by Fed. R. Crim. P. 8(a).[5] Here the joinder was clearly permissible since the crimes charged were all of the same or similar character. Thus, our inquiry must focus on whether the record below suggests that, by virtue of the joinder, the appellant's right to a fair trial was sufficiently prejudiced so as to warrant the relief provided by Rule 14.

The obvious purpose of Rule 8(a)'s liberal joinder provision is to promote judicial and prosecutorial economy by the avoidance of multiple trials. *United States v. McGrath,* 558 F.2d 1102, 1106 (2d Cir. 1977), *cert. denied,*—S. Ct.—(1978). To accept the appellant's view here would clearly violate the intent of Rule 8(a) in that his motion implicitly proposed that at least two and perhaps as many as five separate trials would be

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5. Rule 8(a) provides:

> (a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

required to prosecute all ten counts of the indictment. Given the obvious burden imposed upon the prosecution and the trial court in terms of both time and expense, such a result would be as intolerable as it is unnecessary. That is especially true here because the evidence in any subsequent trial would be largely duplicative of that presented in the initial trial. *See United States v. Taylor,* 334 F. Supp. 1050, 1056 (E.D. Pa. 1971), *aff'd* 469 F.2d 289 (3d Cir. 1972).

Furthermore, no substantial prejudice has been demonstrated. The appellant merely asserts that the jury would be incapable of sifting through and separating the evidence and applying it to the appropriate counts of the indictment. This assessment is belied by the fact that the jury's verdict acquitted Niederberger of four of the ten counts. That result establishes beyond question that the jury was capable of evaluating the evidence relating to each separate count.

Accordingly, we are satisfied that the joinder of offenses in a single indictment failed, in any sense, to infringe upon Niederberger's right to a fair trial, and consequently we find no abuse of discretion in the district court's resolution of the Rule 14 application.

IMMUNITY FOR PROSPECTIVE DEFENSE WITNESSES

Niederberger's second contention is directed to the district court's refusal to require the Government to seek use immunity, pursuant to 18 U.S.C. §6002,[6] for the proposed defense witnesses, Fitzgerald and Standefer, the two Gulf employees instrumental in providing Niederberger with the gratuities underlying the indictment. The appellant maintains that without a grant of immunity both men would have refused to testify on his behalf. Thus, Niederberger argues, the failure of the court to compel a grant of immunity denied him his Fifth Amendment right to due process and his Sixth Amendment right to compulsory process.

The rule in this Circuit is clear; a trial court has no authority to provide use immunity for a defense witness. *United States v. Morrison,* 535 F.2d 223, 228-29 (3d Cir. 1976), *cert. denied,*—S. Ct.—(197); *United States v. Berrigan,* 482 F.2d 171, 190 (3d Cir. 1973).[7] Similarly, except in an extraordinary circumstance which was not present below, a trial court cannot compel the Government to offer such immunity to a prospective witness. *Morrison, supra,* 535 F.2d at 229.

Moreover, there was no affirmative showing, as required by §6002, that either Fitzgerald or Standefer

6. 18 U.S.C. § 6002 makes available use immunity for a witness who refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

(1) a court or grand jury of the United States

. . . .

7. The function of the trial court is limited to determining whether a request for immunity made by the government is in accord with the statutory procedure. *See Ullman v. United States,* 350 U.S. 422, 433-34 (1956).

would have refused to testify if called as defense witnesses. Accordingly, we conclude that the trial court's denial of the immunity request did not offend defendant's Fifth or Sixth Amendment rights.

DUPLICITIOUSNESS

The indictment charges, in the odd-numbered counts, that Niederberger did "accept, receive and agree to receive a thing of value" from Gulf. In the even-numbered counts, Niederberger is alleged to have received a "fee, compensation and reward" from Gulf. The appellant insists that, because of the conjunctive phrasing of the indictment, he is charged with three distinct offenses in each count, in violation of Fed. R. Crim. P. 8(a).[8] Thus, Niederberger contends, the trial court erred when it denied his motion to dismiss the indictment for duplicitousness.

In *United States v. Starks,* 515 F.2d 112, 116 (3d Cir. 1975), we defined duplicity as "the joining in a single count of two or more distinct and separate offenses". We note that although the indictment is framed in the conjunctive, the statutes forming the basis for the indictment are worded in the disjunctive.[9] Nonetheless, this apparent inconsistency presents no difficulty, for it is settled law that where a statute denounces an offense disjunctively, the offense may be charged conjunctively in the indictment. *See, e.g., United States v. Gunter,* 546 F.2d 861, 868-69 (10th Cir.), *cert. denied,* 97 S. Ct. 2189 (1977); *United States v. Malinowski,* 347 F. Supp. 347, 352 (E.D. Pa. 1972), *aff'd* 472 F.2d

8. For the text of Rule 8(a), see n.6, *supra.*

9. The texts of the pertinent statutes appear in notes 1 and 2, *supra.*

850 (3d Cir.), *cert. denied,* 411 U.S. 970 (1973). Moreover, guilt may be established by proof of any one act named disjunctively in the statute. *See Turner v. United States,* 396 U.S. 398, 420 (1970); *United States v. Gimelstob,* 475 F.2d 157, 163 (3d Cir.), *cert. denied,* 414 U.S. 828 (1973); *United States v. Pauldino,* 443 F.2d 1108, 1112 (10th Cir.), *cert. denied,* 404 U.S. 882 (1971).

Therefore, we must find the appellant's argument grounded on duplicitousness to be meritless.

QUID PRO QUO

Prior to trial, Niederberger moved to dismiss the indictment on the grounds that the charges set forth in the bill did not allege facts sufficient to constitute a criminal offense under the illegal gratuity statutes, 18 U.S.C. §201(g) and 26 U.S.C. §7214(a)(2). Niederberger maintains here that the trial court's denial of that motion constitutes plain error.

The statutes proscribe the receipt by a public official of a gratuity, except where specifically permitted under the law, for the performance of an official act or duty. The appellant contends that the language of each statute injects a requirement of a quid pro quo; but appellant then goes much further and asserts that the indictment must allege that Niederberger received the golfing trips in return for some specific, identifiable act which he performed or was to perform in the future.

Viewing §201 in its entirety, it is apparent that the elements of the offense which Niederberger claims should be alleged in an indictment which charges a violation of §201(g) are found in §201(c)(1), one of the bribery sections of the statute. Section 201(c)(1) subjects a public official to prosecution if he

> corruptly . . . accepts, receives, or agrees to receive anything of value for himself . . . in return for:
>
> (1) being influenced in his performance of any official act . . . .

It is clear, then, that § 201(c)(1) requires as one of its elements a quid pro quo. In fact, we find this to be the primary distinction between subsections (c)(1) and (g). Support for this view is found in *United States v. Brewster,* 506 F.2d 62 (D.C. Cir. 1974), where the court, analyzing the differences between subsections (c)(1) and (g), held that "[t]he bribery section [(c)(1)] makes necessary an explicit *quid pro quo* which need not exist if only an illegal gratuity is involved". *Id.* at 72.[10]

Thus, we find it unnecessary for the Government to allege in an indictment charging a § 201(g) offense that a gratuity received by a public official was, in any way, generated by some specific, identifiable act performed or to be performed by the official. A quid pro quo is simply foreign to the elements of a subsection (g) offense. What is proscribed, simply put, is a public official's receipt of a gratuity, to which he was not legally entitled,

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10. Further support of this conclusion is found in cases wherein courts have considered the elements of an 18 U.S.C. § 201(f) offense — forbidding the *payment* of a gratuity to a public official — and have concluded that a quid pro quo is not among them. *See e.g., United States v. Alessio,* 528 F.2d 1079, 1082 (9th Cir.), *cert. denied,* 426 U.S. 948 (1976); *United States v. Umans,* 368 F.2d 725, 729-30 (2d Cir. 1966), *cert. dismissed,* 389 U.S. 80 (1967); *United States v. Irwin,* 354 F.2d 192, 197 (2d Cir. 1965), *cert. denied,* 383 U.S. 967 (1966). It follows that if proof of a quid pro quo is not required under § 201(f), it need not be established in a § 201(g) prosecution.

given to him in the course of his everyday duties, for or because of any official act performed or to be performed by such public official, and he was in a position to use his authority in a manner which could affect the gift-giver. *See United States v. Alessio,* 528 F.2d 1079, 1082 (9th Cir. 1976); *Brewster, supra,* 506 F.2d at 72, n.26.

In light of the foregoing, and because of the obvious parallelism in the proscriptions of § 201(g) and § 7214 (a)(2) offenses, we hold that § 201(g) does not require an allegation or proof of a quid pro quo, nor does § 7214 (a)(2). Thus, we find the indictment sufficiently alleged acts made criminal by the illegal gratuity statutes.

Sufficiency of the Evidence

At the conclusion of the Government's case, the defendant moved unsuccessfully for acquittal, asserting an insufficiency of evidence. On this appeal, Niederberger has renewed the following two arguments presented below in support of that motion: (1) the Government did not prove that Niederberger received or agreed to receive a gratuity in Pittsburgh, as alleged in the indictment; and (2) the Government failed to prove that Gulf paid a gratuity to Niederberger, again as alleged in the indictment.

In reviewing the sufficiency of the evidence adduced at trial, we may not disturb a verdict if the evidence, when viewed in the light most favorable to the Government, could justify a jury finding of guilt beyond a reasonable doubt. *Government of the Virgin Islands v. Bradshaw,* — F.2d —, — (3d Cir. 1978); *Government of the Virgin Islands v. Peterson,* 507 F.2d 898, 900 (3d Cir. 1975).

Counts 3, 5, 7 and 9 allege that Niederberger "at Pittsburgh . . . did unlawfully and knowingly accept, receive, and agree to receive things of value" from Gulf in violation of 18 U.S.C. § 201(g). Counts 8 and 10 allege that Niederberger "at Pittsburgh . . . did unlawfully and knowingly, receive a fee, compensation, and reward" from Gulf in violation of 26 U.S.C. § 7214(a)(2). As his first contention, the appellant maintains that since venue must lie in the district where the criminal acts occurred,[11] and, since the Government failed to introduce evidence that any of the alleged criminal acts were committed in Pittsburgh, the charges in the indictment were not proven and, accordingly, the jury verdict must be overturned.

We have heretofore determined that although each count of the indictment is phrased in the conjunctive, the prosecution need only prove one of the three acts alleged in each count. Common sense suggests that when Niederberger boarded an airplane in Pittsburgh to begin his round-trip flights, the tickets for which were ultimately paid for by Gulf, to Miami (Count III), Absecon (Count V), Pebble Beach (Counts VII and VIII), and Las Vegas (Counts IX and X), he had accepted and received a thing of value or a remard in Pittsburgh.

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11. The appellant bases this argument on language found in the venue provisions of the Sixth Amendment ("The accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .") and Fed. R. Crim. P. 18 ("Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed.").

Moreover, in framing his venue argument, the appellant appears to have overlooked 18 U.S.C. § 3237(a). This statute provides:

> [A]ny offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

The above language clearly indicates that the acts which began in Pittsburgh, even though it may be argued that the acts were completed elsewhere, are sufficient to establish venue in the Western District of Pennsylvania for those activities charged in the indictment which took place in other locations. *See United States v. Barnard,* 490 F.2d 907 (9th Cir. 1973), *cert. denied,* 416 U.S. 959 (1974).

In his second challenge to the sufficiency of the evidence, Niederberger argues that the Government failed to prove that the Gulf employees who had utilized their credit cards to cover Niederberger's expenses on each of the golfing trips were even reimbursed by Gulf for their expenditures. In order to properly consider this argument, the testimony of Government witnesses Cox, Boyd, Ferris, and Hobron must be reviewed.

The testimony of Cox, the manager of accounting at Gulf, concerned the procedure employed at Gulf in situations where an employee, who had incurred expenses on Niederberger's behalf, sought reimbursement. The witness testified that the travel and expense vouchers submitted by these employees, upon which Niederberger's name appeared — all of which had been admitted into evidence — reflected an expense of Gulf.

Boyd, an I.R.S. security inspector, summarized these expenses incurred by Gulf on behalf of Niederberger as established by the vouchers. Boyd testified that, based on his examination of the vouchers, Gulf expended over $7000. on Niederberger between 1965 and 1975, when included reimbursements for golfing trips to Miami, Las Vegas, and Absecon.

Ferris, Standefer's secretary, described the contents of various vouchers which had been approved for reimbursement. Among them were expenditures for Niederberger's round-trip airplane tickets, hotel and golf charges, and restaurant checks from the golfing resorts in Miami, Absecon, Pebble Beach, and Las Vegas.

Finally, there is the testimony of Hobron, an I.R.S. investigator, who conducted an extensive interview of Niederberger prior to the return of the indictment. Hobron testified that during the course of this interview, Niederberger admitted that he was aware that Gulf arranged and paid for the trips to Miami, Absecon, Pebble Beach, and Las Vegas.

The cumulative effect of this testimony leads us to the inescapable conclusion that the Government provided more than sufficient evidence to permit a jury to find that Gulf paid for Niederberger's various golfing trips.

JENCKS MATERIALS

At trial, Hobron, the criminal investigator for the I.R.S. who had interviewed Niederberger, testified — as we have previously noted — as to certain admissions made by Niederberger regarding his receipt of gratuities from Gulf. During cross-examination, Hobron revealed that his rough notes of the interview had been turned over to his superiors after he had reduced the

notes to a typewritten report. Thereafter, the Government informed the court that the notes had been destroyed pursuant to I.R.S. administrative guidelines.

Maintaining that these rough notes were materials which should have been supplied to him under the Jencks Act, 18 U.S.C. § 3500, the defendant thereupon moved for a mistrial by reason of the Government's failure to preserve and produce the rough notes. Niederberger argued that without the rough notes the defense was denied an effective cross-examination of the I.R.S. investigator. Thus, the investigator's testimony should have been stricken. Further, he urged, because of the impact on the jury of the incriminating testimony, and the obvious prejudice to the defense which could not be cured by an instruction from the court, a mistrial was the only appropriate remedy. The trial court denied the motion, concluding that at the time of the trial below the law in the Third Circuit did not require the preservation and production of such rough notes.[12]

The law of this Circuit with respect to the preservation and production of rough interview notes was established in *United States v. Vella,* 562 F.2d 275 (3d Cir. 1977) (per curiam). In *Vella,* relying on the reasoning advanced in *United States v. Harrison,* 524 F.2d 421 (D.C. Cir. 1975), we held that:

> the rough interview notes of F.B.I. agents should be kept and produced so that the trial court can determine whether the notes should be made available to the appellant under the rule of *Brady v.*

12. The trial was conducted between February 17th and February 25th, 1977. The trial court was correct in noting that at that time the preservation of rough notes was not required.

> *Maryland,* 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed. 2d 215 (1963), or the Jencks Act.

Vella, supra, 562 F.2d at 276.

However, despite the requirements of *Vella,* on the record before us it is our view that even without the I.R.S. investigator's testimony the Government's evidence established a sufficient basis for the jury to reach its verdict.[13] This conclusion, coupled with the absence

13. The record reveals that Hobron's testimony concerned certain admissions made by Niederberger and established two particulars which the jury could have accepted as factual: 1) Niederberger believed that Gulf had arranged and paid for each of the golfing trips charged in the indictment; and 2) Niederberger knew his acceptance of those free vacations was illegal. While we view Hobron's testimony as damaging, we do not regard it as critical to a successful prosecution.

In addition to Hobron's testimony, the government introduced additional testimony as well as documentary evidence from which the jury could have found, beyond a reasonable doubt, that not only did Niederberger permit Gulf employees to pay his expenses at resorts in Miami, Absecon, Pebble Beach, and Las Vegas, but, also, that Gulf itself, through its reimbursement of their employees, actually paid those expenses.

The Government's witnesses, Vendrell, Conover, Nelson and Alderfer, established that Niederberger was a guest, during the time periods specified in the indictment, at the Doral Country Club, the Seaview County Club, the Del Monte Lodge and the Desert Inn. Each also testified that Niederberger's expenses were charged to credit cards of Gulf employees.

Sandra Ferris, Standefer's secretary at Gulf, testified to the contents of employee expense vouchers which detailed the expenses of Gulf employees, including round-trip airline tickets, incurred on behalf of Niederberger for the golfing trips to resorts in Absecon, Pebble Beach and Las Vegas. In each case it is clear that the

of any suggestion that the destruction of the notes under I.R.S. administrative procedure was performed in bad faith, requires a finding that if there were error below it was harmless. *Vella, supra,* 562 F.2d at 276.

The remaining allegations of error advanced by the appellant are without merit and must be rejected.[14]

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jury could have found that the Gulf employee who had expended sums on Niederberger was reimbursed by Gulf.

Ferris did not testify, however, to any expense vouchers submitted which related to expenses incurred at the Doral Country Club in Miami. Nor do we find any testimony, other than Hobron's, which directly establishes that Gulf reimbursed Fitzgerald for Niederberger's expenses at Doral. However, we are satisfied that the jury, given the pattern of the arrangements, could permissibly infer that Gulf did, in fact, reimburse Fitzgerald for those expenses. The jury heard Ferris testify that the expense vouchers submitted to Gulf for the Absecon, Pebble Beach and Las Vegas trips were all submitted by Fitzgerald, and in each case Fitzgerald was reimbursed by Gulf. Vendrell testified that Fitzgerald charged Niederberger's expenses at the Doral in Miami with his American Express Card. Martin Boyd, an I.R.S. security inspector, testified that his review of the Niederberger expenses paid by Gulf included trips to Las Vegas, Absecon and Miami, the location of the Doral Country Club. Based on the cumulative impact of that testimony, we find the jury could reasonably infer that Fitzgerald was reimbursed by Gulf for the Doral expenses.

14. The remaining contentions are:

(1) denial of the defendant's request to examine the grand jury attendance records;

(2) denial of the defendant's motion to dismiss the indictment for failure to record certain grand jury testimony;

(3) denial of the defendant's motion to dismiss the indictment for impermissible selective prosecution;

For the foregoing reasons, the judgment of the district court will be affirmed.

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(4) admitting testimony concerning the defendant's salary;

(5) admitting testimony concerning an ongoing I.R.S. investigation into Gulf and certain of its employees;

(6) admitting testimony concerning Niederberger's confession;

(7) admitting testimony concerning a summary of Gulf's entertainment expenditures on Niederberger;

(8) admitting Gulf travel and expense reports which concerned expenditures on Niederberger;

(9) denial of Niederberger's mistrial motion based on the prosecution's opening remarks to the jury; and

(10) the district court's failure to properly charge the jury.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX B

Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 77-1575

UNITED STATES OF AMERICA

v.

CYRIL J. NIEDERBERGER,

Appellant

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, HIGGINBOTHAM, *Circuit Judges,* and BARLOW, *District Judge**

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

MAX ROSENN
Judge

Dated:

*Sitting by designation.

No. 78-234

In the Supreme Court of the United States

OCTOBER TERM, 1978

CYRIL J. NIEDERBERGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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CYRIL J. NIEDERBERGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 580 F. 2d 63.

JURISDICTION

The judgment of the court of appeals was entered on May 5, 1978. A petition for rehearing was denied on July 12, 1978. The petition for a writ of certiorari was filed on August 10, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 201(g) and 26 U.S.C. 7214(a)(2), which prohibit the receipt of gratuities by public officials

for or because of official acts, require proof that the defendant performed specific acts in exchange for the gratuities received.

2. Whether the government was required to provide use immunity for two potential defense witnesses.

3. Whether the indictment should have been dismissed because the government failed to record the testimony of the only witness appearing before the grand jury.

4. Whether the district court erred in denying petitioner's request for a special evidentiary hearing on the issue of selective prosecution.

5. Whether the indictment should have been dismissed for duplicitousness.

6. Whether the district court erred in denying petitioner's motion for severance.

7. Whether the testimony of an IRS investigator should have been stricken because the rough notes of his interview with petitioner were destroyed prior to trial pursuant to IRS guidelines.

8. Whether venue was properly laid in the Western District of Pennsylvania.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner, a government employee, was convicted on six counts of accepting illegal gratuities, in violation of 18 U.S.C. 201(g) and 26 U.S.C. 7214(a)(2).[1] He was

[1]Petitioner was charged in a ten-count indictment with illegally accepting five trips from a corporation for and because of official acts performed by him. Each trip provided the predicate for two counts of the indictment, the odd numbered counts alleging violations of 18 U.S.C. 201(g) and the even-numbered counts alleging violations of 26 U.S.C. 7214(a)(2). The jury acquitted petitioner on Counts I, II, IV and VI.

sentenced to six months' imprisonment, to be followed by a five-year period of probation, and was fined $5,000. The court of appeals affirmed in a thorough opinion (Pet. App. A).

The evidence adduced at trial showed that between 1967 and 1975 petitioner was a large-case manager in the Pittsburgh office of the IRS (Tr. 106, 143-144, 150). As a large-case manager, petitioner supervised the group of revenue agents assigned to audit corporate income tax returns of Gulf Oil Corporation (Tr. 146). Petitioner's responsibilities also included developing a comprehensive outline of the specific procedures to be utilized during the Gulf audit. Petitioner was authorized to make all final decisions relating to the scope and depth of the audit (Tr. 149-150, 176-177). After each audit of Gulf's tax returns, representatives of the company would confer with petioner's staff to discuss whatever tax adjustments the auditors thought necessary.

During the period that petitioner served as a large-case manager assigned to the Gulf audits, he accepted from Gulf several golfing vacations at various resort hotels. In January 1973, petitioner spent four days at the Doral Country Club in Miami Beach, Florida, in the company of Joseph Fitzgerald, who at the time was Gulf's Manager for Federal Tax Compliance. Petitioner's bill was transferred to Fitzgerald's account and was subsequently charged to Fitzgerald's American Express card (Tr. 33-37, 109-110, 242-246). In August and September of 1973, petitioner, accompanied by his wife, spent four days at the Seaview Country Club in Absecon, New Jersey, in the

company of Fred Standefer, Gulf's Vice President for Tax Administration. Petitioner's expenses, and those of his wife, were billed to Arthur Harris, Gulf's Manager of Government Relations, at the Gulf Oil Building in Pittsburgh, Pennsylvania (Tr. 34-35, 46-48, 51-53, 110-111, 115). In April 1974, petitioner spent four days at the Del Monte Lodge in Pebble Beach, California, in the company of Fitzgerald and Standefer. Again, Fitzgerald charged petitioner's bill to his American Express card (Tr. 46-63). Two months later, in June 1974, petitioner and his wife were guests of Fitzgerald for five days at the Desert Inn and Country Club in Las Vegas, Nevada (Tr. 66-71, 74-75, 111-112). All of these trips coincided with the opening or closing of particular Gulf audits by petitioner's group of revenue agents (Tr. 145-157, 196).

In January 1976, IRS inspectors interviewed petitioner after first advising him of his *Miranda* rights (Tr. 104-106). Petitioner admitted receiving hundreds of gratuities from Gulf during the period from 1967 to 1975. He also admitted that he began receiving them after he assumed responsibility for the Gulf audits (Tr. 106-107). Petitioner stated that he knew that it was a criminal offense to accept these gratuities (Tr. 107, 112-113, 118, 121, 197).

ARGUMENT

1. Petitioner contends (Pet. 12) that 18 U.S.C. 201(g) and 26 U.S.C. 7214(a)(2) require that the government allege and prove "some specific official act" that he performed as the "quid pro quo" for the gratuities that he received. The indictment and proof, however, fully satisfied the requirements of these statutes, and there was no need to show a specific quid pro quo tied to each gratuity.

18 U.S.C. 201(g) forbids a public official to accept anything of value, other than lawful compensation, "for or because of any official act performed or to be

performed." 26 U.S.C. 7214(a)(2) prohibits the receipt of any compensation or reward, except as provided by law, "for the performance of any duty." The indictment in this case charged that petitioner, in his capacity as an IRS official with supervisory authority over Gulf income tax audits, received gratuities from Gulf for and because of the audits performed under his supervision. The evidence showed that petitioner received gratuities from Gulf tax executives beginning when he assumed authority over the Gulf tax returns and coinciding with the opening and closing of particular Gulf audits. Petitioner admitted that he knew that his receipt of gratuities from Gulf constituted a crime. It is obvious that petitioner was not being lavishly and expensively entertained to foster general good will. The gratuities related directly to his official action in connection with the Gulf tax audits. There was no need to trace each payment to a particular act by petitioner constituting a quid pro quo. See *United States* v. *Brewster*, 506 F. 2d 62, 72 (D.C. Cir. 1974), contrasting the prohibition of bribery under 18 U.S.C. 201(c) and the prohibition of gratuities under 18 U.S.C. 201(g):

> The bribery section makes necessary an explicit *quid pro quo* which need not exist if only an illegal gratuity is involved; the briber is the mover or producer of the official act, but the official act for which the gratuity is given might have been done without the gratuity, although the gratuity was produced because of the official act.

Accord, *United States* v. *Alessio*, 528 F. 2d 1079, 1082-1083 (9th Cir.), cert. denied, 426 U.S. 948 (1976); *United*

States v. *Irwin*, 354 F. 2d 192, 196 (2d Cir. 1965), cert. denied, 383 U.S. 967 (1966).[2] Thus, petitioner's conviction under Sections 201(g) and 7214(a)(2)[3] was entirely proper.

2. Petitioner next contends (Pet. 20-23) that the district court erred in not requiring the government to seek use immunity for two potential defense witnesses. This contention fails for several reasons.

By its plain terms, the federal immunity statute (18 U.S.C. 6002-6003) provides that immunity should be conferred only upon prospective witnesses who have refused to testify on the basis of the privilege against self-incrimination. Here, petitioner has made no affirmative showing that either of his proposed witnesses intended to assert the privilege. Petitioner merely asserts that these witnesses "were expected" to assert a privilege under the

[2]In *Irwin*, the Second Circuit explained the purpose of the broad prohibition against receiving gratuities "for or because of any official act" as follows (*id.* at 196):

> The awarding of gifts thus related to an employee's official acts is an evil in itself, even though the donor does not corruptly intend to influence the employee's official acts, because it tends, subtly or otherwise, to bring about preferential treatment by Government officials or employees, consciously or unconsciously, for those who give gifts as distinguished from those who do not. * * * The iniquity of the procuring of public officials, be it intentional or unintentional, is so fatally destructive to good government that a statute designed to remove the temptation for a public official to give preferment to one member of the public over another, by prohibiting all gifts "for or because of any official act," is a reasonable and proper means of insuring the integrity, fairness and impartiality of the administration of the law.

[3]The language in Section 7214(a)(2) is parallel to that contained in Section 201(g) in that it provides punishment for any revenue officer who "receives any fee, compensation, or reward, except as by law prescribed, for the performance of any duty * * *." The court below correctly held that this provision also applies to the facts of this case (Pet. App. 10a-12a).

Fifth Amendment (Pet. 20). Petitioner was free to call them on his own behalf, but he chose not to do so. Since he did not do so and since they did not assert the privilege, the issue that petitioner seeks to argue is not presented.

Moreover, the immunity statute provides that an immunity order must be initiated "upon the request of the United States attorney" (18 U.S.C. 6003), and it is well recognized that a trial court is without authority either to immunize a prospective witness *sua sponte* or to compel the government to seek immunity. See *United States* v. *Allstate Mortgage Corporation*, 507 F. 2d 492, 494-495 (7th Cir. 1974), cert. denied, 421 U.S. 999 (1975); *United States* v. *Ramsey*, 503 F. 2d 524, 532 (7th Cir. 1974); *Cerda* v. *United States*, 488 F. 2d 720, 723 (9th Cir. 1973); *United States* v. *Berrigan*, 482 F. 2d 171, 190 (3d Cir. 1973).[4]

3. Petitioner argues (Pet. 26-27) that the district court erred in denying his motion to dismiss the indictment because the government failed to record the testimony of

[4]Nor is the decision in *United States* v. *Morrison*, 535 F. 2d 223 (3d Cir. 1976), to the contrary. There, as a matter of due process, the Third Circuit stated that there were certain exceptional circumstances in which a district court could compel the government to confer immunity upon a prospective witness. However, *Morrison* involved serious prosecutorial misconduct. The witness decided to invoke her Fifth Amendment privilege in response to intimidation by the prosecutor (*id.* at 229). By contrast, there is no showing here that petitioner ever called Standefer and Fitzgerald as witnesses, that they ever indicated they would invoke their privilege against self-incrimination, or that the prosecutor acted to deprive petitioner of their testimony. Moreover, this is not a case where the government obtained testimony favorable to its case by granting immunity but refused the same to a defense witness who might provide exculpatory information on the same point. See *United States* v. *Ramsey*, *supra*, 503 F. 2d at 532-533; *Earl* v. *United States*, 361 F. 2d 531, 534, n.1 (D.C. Cir. 1966).

the one witness who appeared before the grand jury.[5] This contention is meritless. There is no constitutional or statutory requirement that grand jury testimony be recorded. *United States* v. *Crow Dog*, 532 F. 2d 1182, 1198 (8th Cir. 1976); *United States* v. *Schrenzel*, 462 F. 2d 765, 772-773 (8th Cir.), cert. denied, 409 U.S. 984 (1972). In addition, even if the testimony of the witnesses who appeared before the grand jury had been recorded, the course of the trial could not have been affected; there would have been no occasion even to disclose the testimony to petitioner, since none of the government's witnesses at trial testified before the grand jury.

4. Petitioner contends (Pet. 27-31) that the district court should have held a special evidentiary hearing on his claim of discriminatory prosecution. Specifically, petitioner contends that this was the first prosecution for mere "goodwill entertainment," and that the indictment was therefore improper. As noted above, this is not a case of mere "goodwill entertainment," but rather of receipt of expensive gratuities for official action. Moreover, it is axiomatic that the government "has exclusive authority and absolute discretion to decide whether to prosecute a case." *United States* v. *Nixon*, 418 U.S. 683, 693 (1974). The exercise of selectivity in the enforcement of a criminal statute does not violate the Constitution. *Oyler* v. *Boles*, 368 U.S. 448, 456 (1962); *United States* v. *Neary*, 552 F. 2d 1184, 1194-1195 (7th Cir. 1977); *United States* v. *Brookshire*, 514 F. 2d 786, 788-789 (10th Cir. 1975).

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[5]Petitioner also asserts that he should have been allowed to examine the grand jury attendance records to determine whether the third indictment was returned by a grand jury which heard all of the evidence. This contention is without merit. "[T]he validity of an indictment is not affected by the character of the evidence considered [by the grand jury]." *United States* v. *Calandra*, 414 U.S. 338, 344-345 (1974).

Even if one is able to infer a policy of selective enforcement from the record of enforcement of a particular statute, it is incumbent upon the moving party to establish that "the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Oyler* v. *Boles, supra*, 368 U.S. at 456. Since petitioner has failed to establish even a colorable basis for his claim of discriminatory enforcement, his claim must necessarily fail.

5. The odd-numbered counts of the indictment charged that petitioner "accept[ed], receive[d], and agree[d] to receive a thing of value" from Gulf. The even-numbered counts alleged that petitioner received a "fee, compensation and reward" from Gulf. Petitioner argues (Pet. 32-34) that the district court should have dismissed the indictment for duplicitousness because, as a result of this conjunctive phrasing, he was charged with three separate offenses in each count of the indictment. This assertion is frivolous. It is well settled that a crime denounced disjunctively in a statute may be charged conjunctively in an indictment. *United States* v. *Gunter*, 546 F. 2d 861, 868-869 (10th Cir. 1976), cert. denied, 431 U.S. 920 (1977); *United States* v. *Lee*, 422 F. 2d 1049, 1052 (5th Cir. 1970). Despite the conjunctive phrasing, each count of the indictment charged only a single offense. Each count employed the basic statutory language and set forth the underlying facts constituting the offense. See *Hamling* v. *United States*, 418 U.S. 87, 117 (1974). If petitioner's argument were correct, the result would be that he could have been charged under a properly drawn indictment with even more crimes than he actually was.

6. Petitioner next contends (Pet. 37-39) that the district court erred in denying his motion for severance. He argues that the joinder of the ten counts in the indictment prejudiced him because the jury was presented

with evidence relating to all five golfing trips and that the jury was incapable of separating and distinguishing the evidence with respect to each count. This claim is also groundless. Rule 8(a), Fed. R. Crim. P., expressly provides that offenses are properly joined if they "are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting the parts of a common scheme or plan." Where, as here, the initial joinder is proper, a motion for severance is committed to the sound discretion of the trial court (*Opper* v. *United States*, 348 U.S. 84, 95 (1954)), and the court's denial of such a motion will be overturned only in those rare instances when a defendant affirmatively demonstrates clear prejudice. See, *e.g.*, *United States* v. *Pacente*, 503 F. 2d 543, 545-546 (7th Cir.) (en banc), cert. denied, 419 U.S. 1048 (1974); *United States* v. *Carson*, 464 F. 2d 424, 436 (2d Cir.), cert. denied, 409 U.S. 949 (1972); *United States* v. *Sweig*, 441 F. 2d 114, 118-119 (2d Cir.), cert. denied, 403 U.S. 932 (1971). As the court below correctly noted (Pet. App. 7a), the evidence in separate trials of the several counts would be largely duplicative. Petitioner's suggestion that the jury was incapable of separately analyzing the evidence relating to each count is contradicted by the fact that the jury acquitted petitioner on four of the ten counts. See note 1, *supra*.

7. Petitioner next asserts (Pet. 40-41) that the testimony of an IRS investigator should have been stricken because the rough notes of his interview with petitioner were destroyed pursuant to routine IRS procedures prior to trial. This contention is meritless. The law in the Third Circuit with respect to the preservation and production of rough interview notes was established in *United States* v. *Vella*, 562 F. 2d 275, 276 (3d Cir. 1977). In *Vella*, the court of appeals held that the rough interview notes of

FBI agents should be kept and produced so that the trial court could determine whether the notes should be made available to a defendant. However, as the court below noted (Pet. App. 16a n.12), at the time of petitioner's trial the law in the Third Circuit did not require the preservation and production of such rough interview notes. The courts of appeals that now require the preservation of such notes uniformly have applied this rule only on a prospective basis. *United States* v. *Vella, supra; United States* v. *Robinson*, 546 F. 2d 309, 312 (9th Cir. 1976), cert. denied, 430 U.S. 918 (1977); *United States* v. *Harrison*, 524 F. 2d 421, 434-435 (D.C. Cir. 1975). Accordingly, the destruction of the investigator's notes here, which the court below found to be harmless (Pet. App. 17a-18a), did not constitute reversible error.[6]

8. Finally, petitioner contends (Pet. 35-37) that the evidence failed to show that he received gratuities in the Western District of Pennsylvania and that the district court lacked venue. This contention is groundless. When petitioner boarded airplanes in Pittsburgh to begin his round-trip flights to Miami, Absecon, Pebble Beach, and Las Vegas—trips paid for by Gulf—he then received a thing of value in Pittsburgh. In addition, 18 U.S.C. 3237(a) provides:

> [A]ny offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

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[6]Moreover, government investigative agencies have now changed their procedures so that rough interview notes are to be retained. Accordingly, the issue presented is not likely to be of continuing importance.

Assuming *arguendo* the acts begun in Pittsburgh were completed elsewhere, the language of 18 U.S.C. 3237(a) clearly establishes that venue was properly laid in the Western District of Pennsylvania. See *United States* v. *Barnard*, 490 F. 2d 907, 909-912 (9th Cir. 1973), cert. denied, 416 U.S. 959 (1974).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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